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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application Of City And County Of San Francisco For Rehearing Of Resolution E-4907	A. _____

APPLICATION OF CITY AND COUNTY OF SAN FRANCISCO FOR REHEARING OF RESOLUTION E-4907

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Pursuant to Rule 16.1 of the Rules of Practice and Procedure of the California Public Utilities Commission ("Commission"), the City and County of San Francisco ("San Francisco") submits this application for rehearing of Resolution E-4907. ("Resolution"). The final Resolution was issued on February 9, 2018. Therefore, this application is timely filed.

I. INTRODUCTION

The Resolution institutes a new deadline under which Community Choice Aggregation ("CCA") programs must submit Implementation Plans in order to begin providing service to additional customers. The Resolution also implements a "waiver process" meant to allow CCA programs to begin providing service to additional customers in 2018. According to the Resolution, the purpose of the new deadline is to coordinate with the timeline for mandatory forecast filings in the Resource Adequacy ("RA") program.[1] The Resolution also states that it is in part, "responsive to the directive of D.05-12-041 instructing the Executive Director to publish steps for the submission of Implementation Plans."[2] San Francisco seeks rehearing of the Resolution because:

- The Commission's decision in the Resolution was an abuse of discretion and was arbitrary and capricious because the Resolution is not supported by adequate evidence;
- The Commission did not proceed in the manner required by law because it did not provide an evidentiary hearing as requested by San Francisco in comments on the Draft Resolution, and as required by Public Utilities Code sections 1708 and 1708.5(f)[3]; and
- The Commission's decision is not supported by the findings because the Resolution's findings fail to acknowledge the substantial changes the Resolution makes to Decision (D.)05-012-041.

[1] Resolution E-4907, p.1.

[2] *Id*. at p.2.

[3] All subsequent statutory references are to the Public Utilities Code unless otherwise stated.

II. THE COMMISSION'S DECISION IN THE RESOLUTION CONSTITUTES AN ABUSE OF DISCRETION AND WAS ARBITRARY AND CAPRICIOUS

The Commission's decision in Resolution E-4907 was an abuse of discretion[4] because the Resolution is not supported by substantial evidence. Code Civil Procedure section 1094.5(b) states that an "[a]buse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, *or the findings are not supported by the evidence*."[5] With respect to whether findings are supported by the evidence, section 1094.5(c) states that an "abuse of discretion is established if the court determines that the findings are not supported by *substantial evidence in the light of the whole record*."[6] Not only is the Resolution not supported by substantial evidence, it is entirely lacking in evidentiary support, also making the Commission's decision in the Resolution arbitrary and capricious.[7]

As San Francisco noted in its comments on the Draft Resolution, the Resolution is not supported by an adequate factual record.[8] First and foremost, the Resolution does not adequately define the nature of the supposed problem the Resolution is trying to address. The sole factual support regarding the need for the Resolution is that:

> Public information illustrates the scale of load migration happening in the year-ahead RA program. Existing and new CCAs that were not a part of the year ahead 2018 RA process but plan to serve load in 2018 would have been allocated a System Peak RA requirement of approximately 3,616 MW and a local RA requirement of approximately 1,793 MW. These year-ahead RA requirements were met by the utilities that currently serve these customers. Some of these costs are recovered by the PCIA, however, any contracts less than one year are not captured by the PCIA and are borne by remaining bundled

[4] Public Utilities Code § 1757.1(a)(1).

[5] Emphasis added.

[6] Emphasis added.

[7] *American Coatings Ass'n, Inc. v. South Coast Air Quality Dist.*, 54 Cal.4th 446, 460 (2012) ("When inquiring into whether a regulation is arbitrary, capricious, or lacking in evidentiary support, the court must ensure that an agency has adequately considered all relevant factors, and has demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute.") (internal citations and quotation marks omitted). According to the Court in the *American Coatings* case, both the substantial evidence and arbitrary and capricious standards of review require a "*reasonable basis*" for the decision. (*Id*. at 461).

[8] *Comments of the City and County of San Francisco on Draft Resolution E-4907*, pp. 6-8 (January 11, 2018).

> customers. Due to the confidentiality of utility's market position, the proportion of those contracts that are less than one year cannot be disclosed publicly.[9]

From these sparse facts about load migration, parties were apparently meant to infer that there is an ongoing shifting of costs from CCA to bundled customers. However, the Resolution itself does not commit to whether there are actual stranded costs and/or cost shifting. The Resolution instead merely states that RA contracts of less than one year are not captured by the PCIA, "*potentially* resulting in millions of dollars annually of stranded costs and *potentially* in contravention of the indifference requirement of Section 366.2."[10] Interestingly, the Resolution states that:

> Energy Division issued data requests to PG&E confirming the existence of stranded costs. Responses to these data requests were confidential because of the market-sensitive information they contain. *The Commission does not rely on those responses in making the determinations made herein*.[11]

Based on the scant factual recordsupporting the Resolution, it is impossible for parties to discern crucial, basic information regarding the Resolution, such as:

- whether there are any actual, not just "potential," stranded costs or cost-shifting related to RA contracts of less than one year;
- if there are any stranded costs or cost-shifting related to RA contracts of less than one year, the magnitude of such stranded costs or cost-shifting;
- whether, and to what extent, any such stranded costs or cost-shifting are attributable to CCA formation;
- whether, and to what extent, existing Commission RA decisions and guidance already address any potential cost-shifting;
- whether, and to what extent, RA sales by the utilities have mitigated or could mitigate any stranded costs or cost-shifting; and
- whether there are alternative proposals that would address any short-term RA stranded costs or cost-shifting related to CCA formation and minimize the impact on CCA formation and operation, in order to allow for the "earliest possible effective date" for

[9] Resolution, p. 8.

[10] *Id*. at p. 7 (emphasis added).

[11] *Id*.

implementation of a CCA program as required by Public Utilities Code section 366.2(c)(8).

The lack of an adequate factual record regarding the supposed problem underlying the Resolution was made abundantly clear by Commissioners' comments made during the Commission meeting at which the Resolution was adopted. According to President Picker, the Resolution was needed for reliability purposes.[12] Conversely, according to Commissioners Guzman Aceves and Randolph, the problem being addressed by the Resolution was double procurement.[13] It is unclear how there could be both lack of reliability and double procurement. Further, neither reliability nor double procurement is mentioned at all in the Resolution. The Resolution deals with allocation between utilities and CCAs of RA contracts of less than one year, and costs associated with such contracts, not reliability or double procurement. The utilities themselves acknowledged as much in their comments on the Draft Resolution. According to the utilities, the issue underlying the Resolution could be addressed through bilateral agreements between utilities and CCAs that allow CCAs to pay their share of 2018 RA costs.[14] This indicates that the issue in the Resolution is simply allocation of RA contracts of less than one year, and costs associated with such contracts, since neither reliability nor double procurement could be addressed through a mutual payment agreement between a utility and a CCA.

Based on the foregoing, the Commission abused its discretion and acted in an arbitrary and capricious manner because the evidence supporting the Commission's decision in the Resolution was wholly inadequate for the Commission to make an informed decision regarding the nature of the

[12] California Energy Markets, No. 1464, p. 7 , section 11.1 (February 9, 2018) (quoting President Picker as stating, "I think there's great opportunity for CCAs to do good, but there's also the inevitable opportunity for them to fail to provide absolutely critical services to their customers and endanger their neighbors.")

[13] *Id*. and CPUC Press Release, Docket #: Res E-4907, *CPUC Safeguards Energy Reliability for Community Choice Aggregator Customers* (February 8, 2018).

[14] *Joint Comments of Southern California Edison Company, San Diego Gas & Electric Company, and Pacific Gas and Electric Company on Draft Resolution E-4907*, p. 5 (January 11, 2018). The Commission adopted this proposal under paragraph A of the waiver process set forth in the final Resolution.

problem being addressed by the Resolution. Without such an understanding, it is unreasonable to expect that the Commission could have reached a rational decision in the Resolution.

III. THE COMMISSION DID NOT PROCEED IN THE MANNER REQUIRED BY PUBLIC UTILITIES CODE SECTIONS 1708 AND 1708.5

The utter lack of evidence supporting the Resolution was exacerbated by the Commission's failure to proceed in the manner required by Public Utilities Code section 1708 and 1708.5(f). [15]

Public Utilities Code section 1708 provides that:

> The commission may at any time, upon notice to the parties, and with opportunity to be heard *as provided in the case of complaints*, rescind, alter, or amend any order or decision made by it. Any order rescinding, altering, or amending a prior order or decision shall, when served upon the parties, have the same effect as an original order or decision. (Emphasis added.)

According to the California Supreme Court in *Cal. Trucking Ass'n. v. Pub. Util. Comm*., "[t]he phrase 'opportunity to be heard' implies at the very least that a party must be permitted to prove the substance of its protest rather than merely being allowed to submit written objections to a proposal."[16] Section 1708.5(f) further states that:

> Notwithstanding Section 1708, the commission may conduct any proceeding to adopt, amend, or repeal a regulation using notice and comment rulemaking procedures, without an evidentiary hearing, *except with respect to a regulation being amended or repealed that was adopted after an evidentiary hearing, in which case the parties to the original proceeding shall retain any right to an evidentiary hearing accorded by Section 1708*. (Emphasis added.)

As noted by San Francisco in its comments on the Draft Resolution, D.05-12-041 was adopted after an evidentiary hearing.[17] Therefore, pursuant to sections 1708 and 1708.5, an evidentiary hearing was required as requested by San Francisco in its comments on the Draft Resolution.[18] The final Resolution makes much of the notice and comment period provided.[19] However, a notice and comment period is not sufficient process under the law when the Commission amends an existing Commission decision. Sections 1708 and 1708.5(f) are clear that parties are entitled to an opportunity

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[15] Public Utilities Code § 1757.1(a)(2).

[16] *Cal. Trucking Ass'n v. Pub. Util. Comm*., 19 Cal. 3d 240, 244 (1977).

[17] *Comments of the City and County San Francisco on Draft Resolution E-4907*, p. 9.

[18] *Id*. at pp. 2, 8-9.

[19] Resolution, pp. 16-17.

to be heard *as in complaint cases*, and that this means that parties are entitled to evidentiary hearings if the prior Commission decision was adopted after evidentiary hearings as D.5-12-041 was.

The new annual filing deadline for Implementation Plans results in a significant change to when CCAs can serve additional customers under prior Commission decisions. The waiver process is likewise a substantial change from prior Commission decisions.[20] The Resolution states that the new deadline and process for CCA Implementation Plans is pursuant to Public Utilities Code section 366.2 and D.05-012-041,[21] and that it is implementing language from D.05-12-041.[22] However, the new annual filing deadline, the associated minimum one-year waiting period for CCAs to begin serving additional customers, and the waiver process for 2018 are entirely new, and are substantial departures from D.05-12-041.

D.05-12-041 directed the Executive Director to "prepare and publish instructions for CCAs and utilities which would include a timeline and describes the procedures for submitting and certifying receipt of the Implementation Plan, … and registration of CCAs."[23] Attachment D to D.05-12-041 provided an illustrative timeline and process, and has been the timeline and process in place for the past 12 years. Neither D.05-12-041, nor the existing timeline and process for CCA Implementation Plans (Attachment D to D.15-12-041), included either the annual filing deadline for Implementation Plans, and associated minimum one-year waiting period for CCAs to begin serving additional customers, or the waiver process set forth in the Resolution.

Moreover, D.05-12-041 did not contemplate any such time limitations on when a CCA can begin to provide service. D.05-12-041 expressly directed that the process and timeline prepared and published by the Executive Director "be consistent with the statute [AB 117] and with this order."[24] The new annual filing deadline for Implementation Plans is neither consistent with D.05-12-041, nor

[20] It is worth noting that the waiver process was added to the Resolution in a revision that was posted on the Commission's website on February 2, 2018, and that parties did not have an additional opportunity to comment on the waiver process, except through *ex parte* communications and in public comments at the Commission meeting.

[21] Resolution, p. 1.

[22] *Id*. at pp. 8-9.

[23] D.05-12-041, p. 18.

[24] *Id*.

with the statute. According to the Resolution, the new annual filing deadline for Implementation Plans is authorized by section 366.2(c)(8), which states that the Commission "shall designate the earliest possible effective date for implementation of a community choice aggregation program, taking into consideration the impact on any annual procurement plan of the electrical corporation that has been approved by the commission." However, D.05-12-041 already established both the earliest possible implementation for the CCA program generally[25] and the earliest possible implementation date for an individual CCA's provisions of service.[26] Even with the interim waiver process for 2018, the Resolution's annual filing deadline for Implementation Plans, and associated minimum one-year waiting period for CCAs to provide service, is not consistent with the statutory requirement for the Commission to designate "the earliest possible effective date" for implementation of a CCA program or the Commission's own previous interpretation of section 366.3(c)(8).

While the Commission has the authority to amend or alter prior Commission decisions, it must do so in a manner consistent with the requirements of sections 1708 and 1708.5(f). The Commission did not do so in this case, even though San Francisco expressly requested an evidentiary hearing. Therefore, the Commission, in adopting the Resolution, failed to proceed in the manner required by Public Utilities Code sections 1708 and 1708.5(f).

IV. THE COMMISSION'S DECISION IS NOT SUPPORTED BY THE FINDINGS IN THE RESOLUTION

Despite the significant changes made to D.05-12-041, as described in detail above, the Resolution barely acknowledges the extent of the changes, perhaps because in doing so the Commission would be forced to face its failure to meet the requirements of sections 1708 and 1708.5(f). This oversight is amply demonstrated by the findings in the Resolution, which do not mention any of the changes that the Resolution will make to D.05-12-041. Instead, the Resolution's findings gloss over the changes to D.05-12-041 and try to camouflage them as implementation of the

[25] *Id*. at pp.47-48.

[26] *Id*. "The earliest possible implementation date for a CCA's provision of service would be the date of the completion of all tariffed requirements, but no later than six months after notice from the first CCA or the date the CCA and the utility agree is reasonable. In no event may the utility delay the initiation of CCA service once the utility has implemented the required processes and infrastructure and the CCA has fulfilled tariffed requirements."

prior decision. The text of the Resolution is marginally more forthcoming, at least admitting that the newly adopted deadline for Implementation Plans modifies the prior timeline under D.05-2-041. [27]

According to the California Supreme Court:

> Findings are essential to "afford a rational basis for judicial review and assist the reviewing court to ascertain the principles relied upon by the commission and to determine whether it acted arbitrarily, as well as assist parties to know why the case was lost and to prepare for rehearing or review, assist others planning activities involving similar questions, and serve to help the commission avoid careless or arbitrary action."[28]

Unfortunately, due to the Commission's failure to hold evidentiary hearings as required by law and the lack of evidence supporting the Resolution, the Resolution's findings are similarly deficient, and are, therefore, insufficient to justify the changes the Resolution makes to D.05-12-041.[29]

V. CONCLUSION

The Commission's failure to adhere to procedural requirements and establish an adequate factual record and findings for its actions not only violates statute, but creates an environment of uncertainty and disruption surrounding CCA formation and operation.

Based on the foregoing, San Francisco requests rehearing of Resolution E-4907 so as to provide parties an evidentiary hearing as required under section 1708 and 1708.5 (and as requested by San Francisco in comments on the Draft Resolution), and build an adequate factual record and findings to support the Resolution. Preferably, such an evidentiary hearing would take place within the context of the current RA proceeding (R.17-09-020), in order to provide parties and the Commission an opportunity to fully and fairly review and understand the nature of the supposed problem underlying the Resolution, and address any such problems in a comprehensive, rather than interim or piecemeal, manner. The Scoping Memo in R.17-09-020 already allows for such consideration because it includes as top priority issues "whether participation in the year-ahead RA

[27] Resolution, pp. 10, 13.

[28] *Cal. Manufacturers Ass'n v. Pub. Util. Comm'n*, 24 Cal.3d 251, 258-59 (1979).

[29] Pub. Util. Code § 1757.1(a)(4).

showing should be required in order for an LSE to serve load in the following year, and other resource adequacy and potential cost allocation issues that arise as a result of load migration."[30]

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[30] R.17-09-020, *Scoping Memo and Ruling of Assigned Commissioner and Administrative Law Judge*, p. 6 (January 18, 2018).